IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 45/2023

BETWEEN	**PHILIP WILLIAM ROUTHAN and JULIE VERONICA ROUTHAN (as trustees for the KANIERE FAMILY TRUST)** Appellants
AND	**PGG WRIGHTSON REAL ESTATE LIMITED** Respondent

SUBMISSIONS FOR THE APPELLANTS ON CROSS-APPEAL

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May it please the Court—

I. INTRODUCTION AND SUMMARY

1. PGG claims by its cross-appeal that the Routhans' loss is, at most, $50,000. It frames the point as a submission on the correct calculation of loss, which it says is the difference in value as at the transaction date, though its argument also hints at a *SAAMCO* or remoteness analysis. However analysed, the argument is misconceived.

2. PGG calculates the Routhans' loss as the difference in value as at the transaction date based on its evidence of what the farm would have been worth had the misrepresentation been true (alleged to be $2.95m), less what it was actually worth (alleged to be $2.9m). But this argument is fatally flawed:

    a. The thrust of the Routhans' primary submissions is that the so-called 'normal measure' is not appropriate here, as it does not accurately measure the true loss suffered. PGG's cross-appeal submissions, however, do not even manage to apply the 'normal measure' in tort and FTA cases, instead veering off on a frolic of their own.

    b. PGG's own authorities confirm the 'normal measure' in tort and FTA cases – even if one were to apply it – is price paid less true market value received.[1] But that is not the formula PGG uses. PGG instead creates a notional expectation measure, comprising: (a) an artificial construct of what the farm would have been worth had the representation been true (assuming average production of 103,000 kgMS), from which PGG subtracts (b) an artificial construct of what the farm would have been worth without the representation (assuming average production of 97,000 kgMS), awarding the Routhans the difference.[2]

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[1] See PGG cross-appeal submissions at note 28 and [24]: "*The Court of Appeal was right to conclude in this case that 'the normal measure of loss is the difference between the price paid and the true market value of the property if it had been correctly described'*".

[2] PGG cross-appeal submissions at [24]: "*The normal measure of loss as a consequence of a misrepresentation is the difference between the value of the property, with and without the misrepresentation*".

c. Input (a) is wrong because it ignores the price in fact paid. PGG's argument is really that the Routhans suffered no loss at all. The $50,000 figure is a fig-leaf. The correct and conventional analysis is that the price the Routhans paid at market – $2.8m – reflects the misrepresentation.

d. Input (b) is wrong because it ignores the true market value of the farm as conveyed to the Routhans:

i. PGG's case assumes that the Routhans got a bargain from the hard-nosed Mr Cook, paying $2.8m for a farm that was worth $2.9m. But that is not so.[3] PGG's $2.9m figure is not the result of a market valuation; it is a confection produced on instructions for the purposes of this litigation. On instruction, Mr Hines valued the farm at an assumed production of 97,000 kgMS, assuming also that the production for the most recent season was 105,000 kgMS. His valuation did not reflect the reality that production had been plummeting year-on-year, that the most recent season produced only around 90,000 kgMS, or that the current season was on track to produce only 85,000 kgMS. The Court of Appeal was right to find this self-serving methodology unhelpful.

ii. Using orthodox market valuation principles, the Routhans' valuer valued the farm at $2.32m based on an average efficient production of 84,000 kgMS. PGG's own valuer accepted that this approach is the preferred valuation practice. It reflects the value of the thing the Routhans in fact received.

3. Insofar as PGG is seeking to invoke a *SAAMCO* or remoteness analysis, it is arguing for a novel form of *SAAMCO* cap. According to PGG, loss

[3] Mr Cook said to the agent at the time that the "*price of [$2.8m] was what it was and it was non negotiable*": Cook NOE 505 (19–20 and 28–31) **[204.1125]**. See also NOE 503 (19–30) **[204.1123]**.

should be capped at the difference between: (a) the represented value (excluding the market evidence of that value, being the sale itself); and (b) some hypothetical value which seeks artificially to extricate the effect of the misrepresentation (not the market value of the thing received).

4. PGG has offered no reasoning, principle or authority in support of such a contrived cap. Nor could it do so. As addressed in the Routhans' primary submissions, *SAAMCO*'s legacy is the principle that a wrongdoer should only be liable for the kind of loss their duty was intended to guard against. It provides no licence for the kind of formula urged by PGG. Moreover, even in security overvaluation cases, such as *SAAMCO* itself, the relevant comparison has always been with the market value. There is no basis for substituting some other hypothetical valuation.

II. THE FACTS: THREE POINTS IN REPLY

The focus on the 4.3 per cent decline is a distraction

5. First, PGG claims that the difference between the misrepresented average (103,000 kgMS) and the true average (98,729 kgMS) entailed "*a relatively small difference of 4.3%*".[4] It sought to make much of that calculation in both Courts below, rightly to no avail.[5]

6. The operative effect of the misrepresentation was not to misstate production by 4.3 per cent. It went much further. In the context of a previous three-year average of 103,000 kgMS (as in the CRT Brochure), the true average would have conveyed a significant drop in the most recent season.[6] Any other trend would have required unrealistic numbers in the other seasons and could therefore be excluded.[7]

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4 PGG cross-appeal submissions at [4].

5 HC at [174]; and CA at [95]–[103].

6 HC at [174]; and CA at [95]–[103]. See also Lewis BOE at [39]–[44] **[201.0040]**; Glennie BOE at [26]–[28] **[201.0072]**; and Glennie Reply BOE at [15]–[21] **[202.0589]**.

7 HC at [174]; Lewis BOE at [41] **[201.0041]**; Savage NOE 726 (1–25) **[204.1346]**; and McAra NOE 648 (11) to 649 (5) **[204.1268]**.

7. Following year-on-year declines, Farm 258 had in fact produced only 90,337 kgMS in the most recent season.[8] It was on track to produce only 85,000 kgMS in the 2010/11 season.[9]

8. Provision of the correct production figure would have sparked a chain of enquiry that would have revealed the significant degree to which Mr Daly had misrepresented the farming system.[10] PGG's expert, Mr Savage, accepted that disclosure of the true average would have revealed a drop in production for the last season, which would have triggered further enquiries into the farming system to identify what had changed.[11]

9. In the context of the other misrepresentations in the Routhan Prospectus, the 103,000 kgMS figure conveyed that Farm 258 had achieved consistently high production in recent years based on a low-input, standalone farming system the Routhans could replicate. The 103,000 figure thus communicated what the experts described as a stable long-term average, status quo production, or sustainable year production.[12] That is, the production a "*farm could deliver in a normal year and under normal cost structure*", as described by PGG's financial expert.[13]

10. But in reality, the stable long-term average was just over 83,000 kgMS.[14] Mr Cook had achieved more only through unorthodox, unsustainable and irreplicable practices.[15] The misrepresentation was accordingly significant and cannot be dismissed as immaterial.

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8 HC at [54]; and CA at [5].
9 Glennie Reply BOE at [19](c) **[202.0590]**.
10 HC at [175]; Glennie Reply BOE at [18]–[21] **[202.0589]**; Lewis BOE at [42]–[43] **[201.0041]**; and Lewis Reply BOE at [51]–[55] **[202.0562]**.
11 Savage NOE 726–727 **[204.1346]**.
12 See, e.g., Lewis Reply BOE at [60] **[202.0564]**.
13 McAra BOE at [82] **[202.0465]**; and McAra NOE 634 (29) **[204.1254]**.
14 HC at [225]. See Hancock BOE at [52] **[201.0142]**; and Lewis BOE at [24] and [38] **[201.0038]**. Across 2009–2019, the New Zealand Dairy Statistics recorded Westland regional average milk production for a farm of this size was 76,335 kgMS (727 kgMS/ha x 105ha): Lewis BOE at [24] **[201.0038]**. Westland Milk Products data equates to 83,580 kgMS (796 kgMS/ha x 105ha).
15 See Routhans' appeal submissions at [20].

Mr Cook did not confirm production

11. Second, in describing the initial meeting between Mr Cook and Mr Daly,[16] PGG omits that the High Court held "*Mr Cook did not confirm that milk production for the most recent season was 103,000 kgMS*".[17]

12. It is also material that:

    a. Mr Daly did not seek or obtain agency rights for Farm 258 at the initial meeting, so had no authority to represent anything about it.[18] The Court of Appeal has recently confirmed the importance of agency agreements.[19] These guard against misrepresentations and the loss they cause to purchasers.[20]

    b. Mr Daly claimed Mr Cook informally confirmed that the average production remained the same.[21] But any suggestion of a confirmation is contradicted by the High Court's finding above. It was not supported by the evidence at trial. Mr Cook maintained that, if asked, he would have told Mr Daly to contact the milk company directly.[22] Mr Daly took notes on the CRT Brochure but did not record anything about production. At trial, he said for the first time he only noted changes against that earlier brochure.[23] But that was not so: he noted "*130 cows wintered on"*, which was the same as stated in the CRT Brochure.[24] Mr Routhan's evidence was that Mr Daly himself admitted in 2015 that Mr Cook had not confirmed production; Mr Daly had simply copied that figure from the CRT Brochure.[25] PGG's 2020 interrogatories also confirm

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16 PGG cross-appeal submissions at [14].
17 HC at [31].
18 Daly NOE 375 (11–17) **[203.0995]**; Denley BOE at [25]–[28] **[201.0124]**; and Crews BOE at [18(a)], [36] and [39] **[201.0092]**.
19 *Soft Technology JR Ltd v Jones Lang Lasalle Ltd* [2022] NZCA 353 at [53], [59] and [64].
20 PGG's own policy acknowledged this: PGG Policy at 21 **[302.0922]**.
21 Daly BOE at [19] **[201.0282]**.
22 Cook BOE at [14]–[16] **[202.0344]**; and Cook NOE 505 (2–20) **[204.1125]**.
23 Daly NOE 373 (18) **[203.0993]**.
24 The CRT brochure described "*260 cows … with half the herd wintered off"* **[301.0227]**.
25 Routhan BOE at [120]–[121] **[201.0021]**.

Mr Daly's reliance on the CRT Brochure for production information.[26]

c. Mr Daly did not use the prescribed "*Rural Information Sheet*", even though he knew it was an integral part of the agency agreement.[27] The required form contained spaces for details about historic production and other aspects of the farm system, and for the vendor to certify the information as "*true and correct*".[28] When Mr Daly sought belatedly to obtain the listing, he tried – unsuccessfully – to secure Mr Cook's consent to pages from the unauthorised Routhan Prospectus he had already prepared and disseminated (which he called the "*West Coast sheet*").[29] But he did not tell Mr Cook anything about the Routhan Prospectus itself.

13. It is, in any event, common ground that Mr Cook declined to confirm production when he and Mr Daly met again on 11 October 2010.[30] Mr Daly's evidence was Mr Cook said words to the effect of "*hang on, I need to check production. I'll have to get back to you*."[31] He accepted that Mr Cook "*wasn't sure*" and was "*unwilling to commit*".[32] But Mr Daly did not tell the Routhans this.[33] He did not correct or qualify his earlier statements. He did not follow up with Mr Cook. He pressed on.

14. Subsequently, at an unknown date, Mr Cook returned the West Coast sheet to PGG with the production figure changed to 97,000 kgMS.[34] He was clear he did not do so before completion.[35] This sheet was never given to the Routhans and instead lay dormant within PGG's files.[36]

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26 PGG interrogatories at [25]–[27] **[305.2761]**.
27 Daly NOE 387 (2–8) **[203.1007]**.
28 Rural Information Sheet **[302.0860]**.
29 Daly NOE 389 (25–29) **[203.1009]**.
30 Daly NOE 392 (10) **[203.1012]**; and Cook NOE 509 (19) **[204.1129]**.
31 Daly BOE at [34] **[201.0285]**.
32 Daly NOE 390 (16–19) **[203.1010]**.
33 Daly NOE 394 (12) **[203.1014]**.
34 Routhan BOE at [62] **[201.0011]**; and West Coast edited form **[305.2944]**.
35 Cook NOE 508–509 **[204.1128]**.
36 Routhan BOE at [62] **[201.0011]**.

Mr Bishop's budgets were based on PGG's misrepresentations

15. Third, PGG is wrong to say that the Routhans' farm consultant, Ross Bishop, took no account of actual production in preparing his pre-purchase budgets.[37]

16. The High Court held that PGG's represented figure of 103,000 kgMS was reflected in Mr Bishop's budgets.[38] There was ample evidence for that finding:

    a. Mr Routhan gave clear and precise evidence that he provided Mr Bishop with the Routhan Prospectus, discussed it with him at length, and that Mr Bishop then based his analysis on the 103,000 kgMS figure.[39] That account remained firm under cross-examination.[40] In contrast, Mr Bishop claimed he did not recall being provided with the Routhan Prospectus but accepted he may have been.[41]

    b. Mr Bishop sent a budget to Mr Routhan late in the afternoon on 10 September 2010 (with further versions following on 13 and 14 September 2010).[42] There is no dispute that the Routhan Prospectus had been provided to Mr Routhan by 10 September.[43]

    c. Mr Bishop's analysis is explicable only by reference to the Routhan Prospectus. He budgeted for total production of 245,000 kgMS for Farm 258 and Casa Finca,[44] which had a combined effective milking area of 250ha.[45] That equates to 980 kgMS/ha, which is exactly the same rate which was represented by PGG for Farm 258

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37 PGG cross-appeal submissions at [14] and [46].
38 HC at [221].
39 Routhan BOE at [52]–[55] **[201.0010]**.
40 Routhan NOE 102 (4–11) **[203.0722]** and 107–109 **[203.0727]**.
41 Bishop NOE 421 (22) to 422 (6) **[203.1041]**.
42 Bishop emails **[302.1021]** and **[302.1022]**.
43 HC at [25]; and Routhan BOE at [41] **[201.0008]**.
44 See, eg, his budgets at **[302.1040]** at **[302.1048]**.
45 Rabobank records at **[302.1081]**–**[302.1084]**, calculating an effective milking platform of 250ha, comprised of 105ha from Farm 258 and ~150ha from Casa Finca (112ha, plus a leased area).

(103,000 kgMS / 105ha). That was also how Rabobank understood Mr Bishop's calculations.[46]

d. Mr Bishop's contrary explanation is not plausible. He said the form of his calculations was to apply a "*long run district average*" of 738 kgMS to every hectare of Farm 258, Casa Finca, the run-off and a leased area.[47] But this was merely a way of cross-checking the plausibility of the represented figures. Mr Bishop well knew that not every hectare of a farm is used for milking, that run-offs are only used for ancillary grazing and feed production, and that the historic production for Farm 258 (and Casa Finca) was well-above the industry average.[48] There is nothing conservative in a methodology that applies a district average milk production figure to every inch of a dairy farm. If such an approach were applied to the combined acreage of Farm 258 and the run-off it would have produced the absurd figure of more than 130,000 kgMS.[49] But operating Farm 258 in conjunction with the run-off would not have resulted in a 27 per cent production increase over the represented 103,000 kgMS. That would not merely be a rock star farm, but the stuff of legend.

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46 Rabobank records at **[302.1082]** and **[302.1084]**.

47 Bishop NOE 433–434 **[203.1053]**; and budget **[302.1048]**. The total hectares of farmland in Mr Bishop's spreadsheet summed to 332, but this included 105ha for Farm 258, 112ha for Casa Finca, 73ha for the run-off and 42ha for leasehold land. It is nonsense to suggest one could obtain the long-run district average of 738 kgMS from *every one* of those hectares, many of which, including the run-off, were not part of the effective milking platform. Mr Bishop was not, by his calculations, assuming district average production for the milking platform itself. He was assuming superlative production for the milking platform, but cross-checking that high-level of production by applying district averages to the full acreage. Mr Bishop had used a different cross-check methodology in a prior budget for a different property (**[302.0864]**), which incidentally contributed the 42ha of leasehold land in Mr Bishop's subsequent calculations. In that prior budget, Mr Bishop had calculated production over a total area of 105ha and the 73ha run-off by taking rough account of the enhanced production from the run-off, resulting in total production of 112,000 kgMS, or 1,067 kgMS/ha as against the 105ha primary farm (**[302.0865]**): Bishop NOE 432 (17) to 433 (3) **[203.1052]**. There was no suggestion in that budget of mere long-run district average return for the hectares of effective milking platform. So too for Farm 258.

48 Bishop NOE 434 (28–34) **[203.1054]**.

49 105 plus 73, multiplied by 738: Bishop NOE 434 (23–27) **[203.1054]**.

17. The Court of Appeal did not need to explore the actual basis and logic of Mr Bishop's calculations, but merely recorded Mr Bishop's evidence that his calculations multiplied long-run district averages,[50] against acreage, coming to total production of 245,000 kgMS for the combined farms.[51]

18. Mr Bishop was, moreover, an exceptionally unreliable witness. The High Court rightly rejected aspects of his evidence as implausible.[52] It should be noted that:

    a. Mr Bishop was joined as a third party by PGG. The claim against him was discontinued two weeks before he provided a brief for PGG.[53] When questioned about whether he had made a deal with PGG, he said that "*if you are inferring that their decision to discontinue me because they felt that the evidence I had produced to date was of some use to them then it is far as any deal might have gone*".[54]

    b. Mr Bishop falsely held himself out as an Agriculture New Zealand consultant, including the words "*Agriculture New Zealand*" prominently on each budget's cover page.[55] Mr Routhan relied on Mr Bishop having that status.[56] Mr Bishop accepted in cross-examination that he was not authorised to hold himself out in this way but continued to deny he had made that representation, despite having done so in writing and even in his statement of defence.[57]

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50 CA at [40].
51 CA at [18].
52 HC at [222].
53 Bishop NOE 418 (17–26) **[203.1038]**.
54 Bishop NOE 419 (1–3) **[203.1039]**.
55 Budgets at **[302.1033]**, **[302.1040]** and **[302.1049]**; and Bishop NOE 413–414 **[203.1034]** and 436 (23) to 436 (7) **[203.1056]**. He had previously worked for Agriculture New Zealand but was made redundant in 2002: Bishop BOE at [4] **[202.0362]**.
56 Routhan NOE 82 (24–26) **[203.0702]** and 94 (18–22) **[203.0714]**.
57 Bishop NOE 413–414 **[203.1034]**.

c. Mr Bishop denied that he knew his budgets would be used to obtain finance, directly contradicting his covering emails which expressly referred to financiers.[58] He referred to sending the budgets "*before [Mr Routhan] made approaches to financiers*", adding, "*Hope everything goes well with the financiers*".[59]

d. Mr Bishop maintained that he did not know the Routhans were proceeding with the purchase of Farm 258, and claimed he did not know they had purchased it.[60] This was contradicted by contemporaneous documents in which he prepared the cow leases for Farm 258.[61] He had also emailed the Routhans on 10 December 2010, just over a week before settlement, saying he looked "*forward to working with you both in your new venture*".[62]

III. LEGAL BASIS OF PGG'S CROSS-APPEAL IS FLAWED

19. PGG says that *"[the] 'normal' measure of loss in this case is no more than $50,000*".[63] That figure is, however, merely the difference between two hypothetical non-market valuations conducted by PGG's valuer, Mr Hines: being $2,950,000 at 103,000 kgMS; and $2,900,000 at 97,000 kgMS.[64]

The 'normal measure' in tort is price paid minus value received

20. The 'normal measure' in tort is the difference between the price paid and market value received.[65] The price paid represents the plaintiff's financial position but for the transaction. The market value received represents their actual financial position at the transaction date. Subtracting the latter from the former equates to loss in a simple case,

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58 Bishop NOE 412 (8–10) **[203.1032]** and 430 (25) to 431 (7) **[203.1050]**; and Bishop emails **[302.1022]** and **[302.1023]**.
59 Bishop emails **[302.1022]** and **[302.1023]**.
60 HC at [222]; and Bishop NOE 424 (6) to 426 (33) **[203.1044]**.
61 HC at [222]; and Bishop NOE 425 (2) to 426 (33) **[203.1045]**.
62 Email **[302.1031]**.
63 PGG cross-appeal submissions at [25].
64 PGG cross-appeal submissions at [6].
65 *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726 (*Altimarloch*) at [62] per Blanchard J and fn 108 per Tipping J. See also *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288 at [72].

as this is the extent of overpayment. As Professor McLauchlan has explained:[66]

> The plaintiff is entitled to be put in the position in which he would have been if the tort had not been committed and, in the case of a tortious misrepresentation inducing a contract, this is usually taken to be the position he would have been in if the contract had not been entered into. Generally speaking, therefore, the plaintiff recovers the difference between the value of what he received and the amount he has outlaid - his positive losses. … Since most of the early cases involved misrepresentation inducing the plaintiff to purchase property (usually shares) either from the defendant or a third party, it was commonly stated that the normal measure of damages for tortious misrepresentation is "price paid minus value received at the time of the contract".

21. This Court's decision in *Altimarloch* illustrates the point. The plaintiffs paid $2.675m for a property worth $2.55m.[67] In tort, the 'normal measure' of loss was limited to $125,000,[68] even though the property would have been worth $2.95m had the misrepresentation in the Council's LIM been true.[69]

PGG is arguing for an expectation measure

22. PGG's quantum of $50,000 is the result of conflating the tort and contract measures. It has framed the 'normal measure' as "*the difference between the value of the property, with and without the misrepresentation*".[70] In doing so, it has replaced 'price paid' with value as represented. That is a subtle but critical difference.

23. It means that PGG's analysis sets up a counterfactual that would put the Routhans in the position they would have been had the misrepresentation been true.[71] That is not in any way a tort measure, but seeks instead to value the expectation interest.[72] PGG's calculation in fact matches the expectation measure Elias CJ and Anderson J (dissenting) favoured in *Altimarloch*, instead of the cost of cure, for the

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66 D McLauchlan "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6(3) Otago Law Review 370 at 374.

67 *Altimarloch* at [21] and [62].

68 *Altimarloch* at [9], [21], and [62] and fn 108.

69 *Altimarloch* at [61]–[62].

70 PGG cross-appeal submissions at [24].

71 At several instances in its submissions, PGG expressly argues that the position should be determined based on the value of the property had the representation been true: at [5] and [36].

72 *Altimarloch* at [27]; *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA) at 419; and *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 19, 26 and 31.

contractual claim against the vendor, being the difference between the property's represented value and actual value.[73]

24. The authorities cited by PGG for this formulation do not support its methodology.[74] Instead, each confirms the 'normal measure' equation in tort and under the FTA as price paid minus market value received (emphasis added in each case):

    a. In *Cox and Coxon Ltd v Leipst*, the Court of Appeal held that damages for the represented profit could not be recovered under the Fair Trading Act.[75] Instead, "*If they would not have purchased at all, then prima facie the loss would be based on the difference between the value of the property and the* ***price paid***".[76]

    b. In *Roberts v Jules Consultancy Ltd (in liq)*, the Court of Appeal stated that "*[t]he normal measure of loss in such a case (often termed a "no transaction" case) is the difference between the* ***price paid*** *and the value of the property received in return*" and upheld the High Court's calculation to that effect.[77]

    c. In *Shabor Ltd v Graham*, the Court of Appeal held "*the correct quantum is the Judge's assessment of the difference between the* ***price paid*** *and the actual value—$530,000*".[78]

Alternatively, PGG is arguing for a novel, rigid and hypothetical *SAAMCO* cap

25. PGG's approach does not work better if analysed through *SAAMCO* and remoteness principles. There is a hint of the latter argument in its submissions. For example, PGG says that $50,000 is the loss that is "*as a matter of law, properly attributable to the misrepresentation*".[79] Or as it phrased it elsewhere, the "*damages properly attributable to PGG's*

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[73] *Altimarloch* at [45] and [236].
[74] PGG cross-appeal submissions at [24]
[75] *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 1 (CA).
[76] At 26.
[77] *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288 at [51] and [72].
[78] *Shabor Ltd v Graham* [2021] NZCA 448, (2021) 22 NZCPR 466 at [66]–[67].
[79] PGG cross-appeal submissions at [50].

misrepresentation", "*appropriate measure of loss suffered as a consequence of the misrepresentation*" or "*loss which is properly attributable to the misrepresentation*".[80]

26. That is the language of *SAAMCO* and remoteness. Yet PGG does not advance any authority or principle justifying its damages formula by way of a *SAAMCO* or remoteness restriction. Nor does PGG explicitly argue for such a restriction. Instead, the restriction is advanced by stealth, and (wrongly) presented as nothing more than an application of the 'normal measure' of loss for tort and FTA cases.

27. Implicit in PGG's argument, once its misstatement of the normal measure is recognised, is a novel form of *SAAMCO* cap through which loss is capped at the difference between: (a) the represented value (excluding the market evidence of such); and (b) some hypothetical value which seeks to extricate the effect of the misrepresentation.

28. The essence of *SAAMCO*, however, is not a convoluted formula, but a principle: a tortfeasor should only be liable for the "*kind of loss*" its duty was intended to guard against;[81] that is, loss sufficiently caused by realisation of a risk captured by the duty.[82] As explained in the Routhans' primary submissions:

    a. A cap can frustrate the core object of damages, which is to put the plaintiff in the position it would have been in had the wrong not occurred.[83] In the realm of damages, whether in tort or in contract, any so-called rules constitute guidance only.[84]

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80 PGG cross-appeal submissions at [6], [8] and [32]. See also at [48].

81 *SAAMCO* at 211H, 212D–H, 213C, 214B and 218A; *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (Wagon Mound No. 1)* [1961] AC 388 (PC) at 426; and *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA) at 683 per Gault J.

82 *SAAMCO* at 214B. See further A Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019) at 120; J Stapleton *Three Essays on Torts* (Oxford University Press, 2021) at 92 and 98; and T Honoré "Responsibility for Harm to Others: A Brief Survey" at 9 and 11–12 and A Burrows "Lord Hoffmann and Remoteness in Contract" at 265–266, both in P Davies and J Pila (Eds) *The Jurisprudence of Lord Hoffmann* (Bloomsbury, Oxford, 2015).

83 *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA) at 19 and 25; and *Benton v Miller & Poulgrain* [2005] 1 NZLR 66 (CA) at [100].

84 *Altimarloch* at [23]–[24] per Elias CJ and [156] per Tipping J.

b. A cap will exclude many items of loss which ought to be included in fair compensation, for example wasted expenditure or other payments reasonably made in reliance on the misrepresentation, or foregone profits (where the effect of the misrepresentation was to prevent such profits from being earned).[85]

c. The appearance of a cap in *SAAMCO* was the result of trying to apply the risk principle to the negligent valuations by measuring the relative causal potency of the overstated valuations through a 'normal warranty measure' analysis, and using the result as a kind of ceiling on recoverable damages. Lord Hoffmann himself acknowledged that it was not a cap, and that he did not "*wish to exclude the possibility that other kinds of loss may flow from the valuation being wrong*".[86] The UK Supreme Court has since effectively confined the particular calculation completed in *SAAMCO* to cases of negligent overvaluation of security.[87]

d. At best, a counterfactual in which the misrepresentation is assumed to be true should be used, only in appropriate cases, as a cross-check on the risk principle.

29. A cap would also undermine the essence of liability in tort for negligent misrepresentations. As Lord Reid explained in *Hedley Byrne*:[88]

> A reasonable man, knowing that he was being trusted or that his skill and judgment were being relied on, would, I think, have three courses open to him. He could keep silent or decline to give the information or advice sought: or he could give an answer with a clear qualification that he accepted no responsibility for it or that it was given without that reflection or inquiry which a careful answer would require: or he could simply answer without any such qualification. If he chooses to adopt the last course he must, I think, be held to have accepted some responsibility for his answer being given carefully, or to have accepted a relationship with the inquirer which requires him to exercise such care as the circumstances require.

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85 *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783 (*Manchester*) at [3] and [130]–[132] and [201]–[202].

86 *SAAMCO* at 219H–220A.

87 *Manchester* at [125] per Lord Leggatt and [26] per Lord Hodge and Sales; and *Meadows v Khan* [2021] UKSC 21, [2022] AC 852 at [53]–[54] per Lord Hodge and Sales.

88 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL) at 486.

30. PGG's argument would alter the legal consequences of choosing that last course. The person who opts to speak, without any relevant qualification, and regardless of the loss caused, have their responsibility limited as if they had chosen to speak only in a qualified way.[89] The law would then, in effect, engraft a disclaimer onto statements made by real estate agents: liability will be limited to the extent of overpayment.

31. PGG would go even further. It is arguing that liability should be capped not at the extent of overpayment, but by reference to some artificially-derived hypothetical value which seeks to extricate the effect of the misrepresentation (such as Mr Hines's valuations with assumed production levels). Even in *SAAMCO*, the comparison has always been with the market value. There is no basis for overlaying some other hypothetical valuation.

IV. MR HINES DID NOT CONDUCT MARKET VALUATIONS

32. As noted, PGG relies on Mr Hines's valuations of Farm 258 at $2.95m (assuming average production of 103,000 kgMS) and $2.9m (with assumed production of 97,000 kgMS). But, Mr Hines's valuations did not reflect the farm's market value, either with or without the misrepresentation. His evidence is accordingly of no help in determining the extent to which the Routhans overpaid, which is the essence of the 'normal measure'.

Mr Hines did not complete market valuations and ignored market evidence

33. Mr Hines's methodology was flawed. He valued the farm, on hypothetical instructions, after the Routhans raised this claim.[90] In cross-examination, Mr Hines accepted all his valuations were based on

[89] Note that the Routhan Prospectus did include a disclaimer, but not a relevant one. PGG in effect disclaimed liability for conveying information authorised by the vendor (see **[305.2916]**). As both Courts below found, it did not disclaim liability for its own rogue misrepresentations that were not so authorised (see HC at [115] and CA at [88]).

[90] Provided on August 2016: Hines BOE at [7] **[202.0510]**; and Hines valuation **[304.2009]**.

assumed production levels.[91] The Court of Appeal rightly held that Mr Hines did not complete true market valuations.[92]

34. Mr Hines's 103,000 kgMS instructed valuation ignores the best evidence of the value of Farm 258 with the misrepresentation, which is the price the Routhans actually paid for it.[93] Mr Cook had tried to sell Farm 258 through a marketing campaign in 2009 with another agent at an advertised price of $2.9m and production of 103,000 kgMS, but could not.[94] He then sold it to the Routhans around a year later for $2.8m. Mr Hines's evidence that Farm 258 was worth $2.9m in October 2010 is implausible and insufficiently supported by market evidence. The Court of Appeal correctly held that "*Given the [2009] marketing campaign conducted by CRT failed to achieve a sale at that price and Mr Cook, an informed, willing, but not overly anxious seller, accepted $2.8 million for it, we are satisfied the Farm was not worth $2.9 million in October 2010*".[95]

35. Mr Hines's 97,000 kgMS instructed valuation[96] departs even further from reality. To get to that assumed level, Mr Hines was instructed that production for the 2009/10 season was 105,000 kgMS,[97] when it was not.[98] In reality, production had been declining year-on-year, with the 2009/10 season producing only 90,000 kgMS.[99] The season in progress was on track to produce only 85,000 kgMS.[100] As the Court of Appeal stated, Mr Hines's valuation took "*no account of the significant decline in production in the prior year, which PGG was specifically asked to verify*".[101]

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91 Hines NOE 562 (31) **[204.1182]**. See further Hines NOE 547–564 **[204.1167]**. Note in particular, Hines NOE 547 (31–32) **[204.1167]**, 550 (27) to 551 (4) **[204.1170]**, 558 (4–14) **[204.1178]**, 561 (26–32) **[204.1181]** and 562 (26–31) **[204.1182]**.

92 CA at [140].

93 Hines valuation at 103,000 kgMS **[305.2776]**; and sale and purchase agreement **[302.1093]**.

94 CA at [142]; Cook BOE at [12]–[13] **[202.0344]**; and Routhan BOE at [12] and [67] **[201.0003]**.

95 CA at [142].

96 Hines NOE 547 (31–32) **[204.1167]**, 558 (4–14) **[204.1178]**, 561 (26–32) **[204.1181]** and 562 (26–31) **[204.1182]**.

97 Hines valuation **[304.2020]**.

98 HC at [54]; and Westland Milk Products data **[304.2209]**.

99 CA at [5] and [143].

100 Glennie Reply BOE at [19](c) **[202.0590]**; and Westland records by month **[304.2286]**.

101 CA at [143].

Mr Cook was not prepared to accept a below-market price

36. PGG's new assertion that "*there was evidence that the vendor was prepared to accept less than market value because the Trust was willing to take on the vendor's farm manager as part of the purchase agreement*" is wrong.[102] There is no such evidence. The part of Mr Cook's brief cited by PGG for that proposition states only that he wanted the sale to be conditional on retention of the manager; not that he was prepared to accept less than market value on that basis.[103]

37. To the contrary, Mr Cook confirmed in cross-examination that he considered $2.8m to be a "*fair price*" for the farm.[104] He had told Mr Daly "*the price [of $2.8m] was what it was and it was non negotiable*".[105] Mr Cook reached that conclusion based on two valuations and after taking extensive advice (from accountants, land agents and a farm consultant).[106] With the benefit of all of that, he concluded it was the price he would have been prepared to pay if he were the purchaser.[107]

38. Nor is there any other basis for suggesting that any kind of discount was factored in. Mr Routhan said the requirement to keep Mr Lord *"didn't worry [them] at all*".[108] Considering the farm was sold as a going concern, with settlement scheduled for mid-season, retention of the farm manager made practical sense, and was not a favour for which a discount would be expected or given.[109]

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[102] PGG submissions at [34].
[103] Cook BOE at [13] **[202.0344]**.
[104] Cook NOE 503 (10–16) **[204.1123]**.
[105] Cook NOE 505 (17–21) **[204.1125]**.
[106] Cook NOE 505 (17–21) **[204.1125]**.
[107] Cook NOE 503 (10–16) **[204.1123]**.
[108] Routhan NOE 110 (11–15) **[203.0730]**.
[109] Mr Hines said in his valuation that "*Having a suitably experience manager 'in situ' would be beneficial to the purchaser and obtaining that person services for at least the first season would in my opinion add to the overall desirability of the purchase of a farm by an inexperienced operator*": Hines valuation **[305.2780]**.

Mr Hancock's valuation is the best evidence of market value

39. The best evidence on Farm 258's actual value in 2010 was that of the Routhans' expert, Mr Hancock. Mr Hancock valued Farm 258 as worth $2.32m (or $2.17m exclusive of dairy company shares) at the time of purchase.[110] As with Mr Hines's instructed valuations, his work was necessarily retrospective. But, unlike Mr Hines, Mr Hancock conducted a careful market analysis. Mr Hancock did not assume artificial production levels,[111] instead valuing Farm 258 based on 'average efficient production', which was around 84,000 kgMS.

40. That method is reliable as it accounts for the effect of different farming inputs and management.[112] It is the usual methodology for a market value. As the Court of Appeal noted, Mr Hines himself "*confirmed that the "average efficient" methodology is the preferred valuation practice*".[113] By applying this methodology, Mr Hancock valued Farm 258 itself, not some assumed hypothetical version of it.

41. Mr Hancock's method also holds up to scrutiny when assessed at a more granular level. He valued Farm 258 at $2.17m excluding dairy company shares, which he calculated as follows:

    a. He focused on the prices achieved by comparable farms in the same location around October 2010, and noted that one virtually contemporaneous transaction was the best comparator.[114] The value of $1.8m (excluding shares) he attributed to Farm 258's land is explicable based on the land value / kgMS ratio of that

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110 CA at [136]; and Hancock BOE at [51]–[53] **[201.0142]** and related valuation report **[201.0148]**.
111 CA at [137]; and Hancock Reply BOE at [13]–[17] **[202.0605]**.
112 CA at [137]–[138]; Hancock Reply BOE at [13]–[17] **[202.0605]**; and Hines NOE 547 (21–28) **[204.1167]**.
113 CA at [138]. Mr Hines acknowledged this in his own report: **[305.2769]**.
114 This was another farm sold by Mr Cook in Kowhitirangi October 2010: Hancock valuation sale (e) at **[201.0174]** and **[201.0176]**. Note Mr Hines also relied on that transaction as a comparable sale, though he incorrectly recorded the sale price as $2.925m: Hancock Reply BOE at [24] **[202.0607]** and Appendix B **[202.0609]**; and Hines valuation **[304.2036]**. That meant Mr Hines used a land value (inclusive of shares) / effective ha figure of $21,995 for that property, when in fact it was around $17,800.

comparable sale.[115] That approach is consistent with the Routhans' expert farming evidence that, at the time, buyers placed "*significant reliance*" on the price / kgMS and that it "*strongly influenced perception of value*".[116] Mr Hines, in contrast, valued the land at $2.15m (excluding shares) based on adopting the top end of his ratio of land value / ha.[117] That was driven by the production level he was instructed to assume.[118] The bottom end of his range would produce a land value of around $1.9m (excluding shares),[119] which is close to Mr Hancock's valuation.

b. Mr Hancock valued the improvements, based on them being in a poor condition, at $364,000.[120] That is consistent with Rabobank's valuation at the time,[121] the report completed by Mr Cook's valuer a year before the transaction (on which PGG now seeks to rely),[122] and the evidence about the poor state of the improvements.[123] Mr Hines, on the other hand, adopted the figure of $600,000 for the improvements,[124] which goes some way towards explaining why the market produced a price $150,000 below his valuation at average production of 103,000 kgMS.[125]

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[115] The comparable sale produced a land value of $21.59/kgMS : Hancock valuation sale (e) **[201.0176]**. Multiplied by 84,000 kgMS Farm 258 equals $1,813,560, which is slightly above the value of $1,790,000 Mr Hancock used. Mr Hancock noted that the comparator was superior to Farm 258 as it had a slightly heavier soil type.

[116] Lewis Reply BOE at [57] **[202.0564]**.

[117] Mr Hines explained that land value of comparable sales, inclusive of dairy company shares, varied between $19,700 and $22,000: **[304.2036]**. He then adopted $22,000 as the multiplier in his analysis to value the land at $2.3m: **[304.2039]**. That equates to $2.15m net of shares.

[118] Hines valuation at **[304.2021]**: "*Overall production analysed above would tend to indicate it is in the middle to upper range for the district on both per cow and per effective hectare basis*".

[119] This is the product of the same calculation Mr Hines completed at **[304.2039]**, but with the multiplier of $19,700 and subtracting the dairy company shares of $154,500.

[120] Hancock valuation **[201.0176]**.

[121] Rabobank valued the improvements at $350,000 at the time of purchase: **[302.1071]** and **[310.5196]**.

[122] Mr Cook's valuer valued the improvements at $408,337 as at 15 August 2009: Property Advisory valuation **[301.0364]** and **[301.0388]**, cited by PGG in its cross-appeal submissions at [41].

[123] Bradley BOE at [10]–[13] **[201.0032]**; Bradley NOE 166 (16–18) **[203.0786]**; Routhan BOE at [66] **[201.0005]**; and Routhan Reply BOE at [8] **[202.0515]**. Mr Cook's valuer also said that as at August 2009 "*The property has a large split level dwelling that is in original [1970s] condition and many of the other buildings are nearing the end of their economic life*": **[301.0347]**. This is further supported by the substantial capital improvements in fact undertaken by the Routhans: Routhan BOE at [97] **[201.0018]**; and HC at [51] (but note those lists also include operational expenditure).

[124] Hines valuation **[304.2039]**.

[125] For assumed production of 103,000 kgMS, Mr Hines valued Farm 258 at $2.95m as at October 2010: **[305.2776]**.

c. It bears noting that PGG advanced the same effective loss submission in the Court of Appeal, apparently under the impression that Mr Hines's valuations were the only valuations produced at trial.[126] That impression was corrected during oral argument.[127] That the loss submission is repeated again in this Court suggests a conclusion being pressed irrespective of, rather than based on, the factual record.

42. PGG also relies on a valuation completed by Mr Mills of Property Advisory Limited for Mr Cook in 2009. He valued Farm 258 at $2.72m (or $2.57m excluding dairy company shares) as at 15 August 2009 on the basis of an average efficient production of 87,000 kgMS.[128] But Mr Hancock's valuation must be preferred for the following reasons:

a. Mr Mills' report predated the transaction by more than a year. Half of the comparable sales on which it relied were from August 2008 and earlier, more than two years before the Routhans signed the contract for Farm 258.[129]

b. There was significant uncertainty in the market in August 2009, which was just over a year after the 2008 GFC.[130] Mr Mills accordingly adopted a wide value range of +/- 10 per cent.[131] The bottom end of that range – $2.45m inclusive of shares – is in the same ballpark as Mr Hancock's $2.32m more than a year later. Any difference is then readily explicable based on deteriorating improvements, a lower average production and more recent market sales data.

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[126] See the Routhans' submissions in opposition to leave to cross-appeal at [30]–[37] and Schedule.

[127] Ibid, especially at the Schedule.

[128] Property Advisory valuation **[301.0335]**. The valuation date of 15 August 2009 is listed at **[301.0388]**.

[129] See the table of comparable sales at **[301.0405]**.

[130] The report stated that "*Recent events in the international credit / equity markets have had a flow on effect to New Zealand financial markets and has resulted in tighter credit conditions and a decrease in the availability of capital (equity and debt) for primary industry investment*" and "*Volatility in New Zealand's exchange rate continues to create uncertainly around the likely returns for dairy product while rising farm working expenses have also affected farm profitability*": **[301.0404]**.

[131] Property Advisory valuation **[301.0390]**.

c. Mr Mills was not a witness. There was no opportunity to cross-examine him. PGG should not now be allowed to augment its inadequate expert evidence in this way. It relies on *Cemp Properties (UK) Ltd v Dentsply Research & Development Corp* for such an approach.[132] But that case is distinguishable. There, the Court rejected the expert evidence for both sides, as "*instead of giving evidence of their actual views as to the true position, [they] enter[ed] into the arena and, as advocates, put forward the maximum or minimum figures as best suited to their side's interests*".[133] It was only then, when the Court was left without helpful expert evidence, that resort was made to an earlier feasibility study which addressed value.[134] In the present case, however, no such criticism can be made of Mr Hancock.

43. PGG is also wrong to suggest that the Court of Appeal relied on *Cemp Properties (UK) Ltd* to permit giving priority to untested hearsay expert evidence.[135] The Court of Appeal did not rely on it for any point of evidence; it only cited it for the 'normal measure'.[136] And on that matter, the case contradicts PGG's cross-appeal, with the English Court of Appeal stating that "*it is well established that in the field of misrepresentation in the ordinary case the basic measure of damages for a fraudulent misrepresentation (and now an innocent misrepresentation) inducing the plaintiff to enter into a contract of purchase is the difference between what the plaintiff paid for the property and the true market value of what he acquired*".[137]

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[132] *Cemp Properties (UK) Ltd v Dentsply Research & Development Corp* [1991] 34 EG 62 (CA).

[133] At 200. Note also at 199, where the Court of Appeal stated it was not surprising that the Judge rejected the defendant's expert evidence that the property would have sold for the same price even if the truth had been disclosed.

[134] At 200–201.

[135] PGG cross-appeal submissions at [43].

[136] CA at [115]: "*The normal measure of that loss is the difference between the price paid and its true market value (in other words, if the property had been correctly described)*".

[137] *Cemp Properties (UK) Ltd v Dentsply Research & Development Corp* [1991] 34 EG 62 (CA) at 200.

44. But the contradiction does not end there. The real significance of *Cemp Properties (UK) Ltd* lies in the fact that the Court of Appeal awarded damages *substantially more* than the 'normal measure'. Lord Justice Bingham (as he then was) explained why the claim could not be so limited:[138]

> Had the true facts become known to the plaintiffs on the morrow of their contract with the defendants, their damage would have been confined to this market value loss. But the true facts did not become known to them for a period of about eight months. During that period the effect of DHB's misrepresentation continued and the plaintiffs incurred expenses and entered into contractual commitments which they would not have done had the misrepresentation not been made and had its effect not continued. To deny the plaintiffs compensation for this loss would, in my judgment, be to undermine the cardinal rule of damages in this field that the plaintiff should be put in the same financial position as if the misrepresentation had not been made. The plaintiffs are not compensated for this damage by reimbursement of their market value loss, because that is a loss they sustained at the moment of contract and this is additional loss which accrued only as a result of the continuing effect of the uncorrected misrepresentation.

45. Lord Justice Nolan (as he then was) similarly held that damages could not be confined to the 'normal measure':[139]

> As a matter of principle, it seems to me to be clear that the plaintiffs were entitled to be compensated for two separate and identifiable items of loss. One was the excess of the price that was paid for the property over its true value in February 1980. The other was additional expenditure incurred by the respondents, which would not have been incurred had the true facts been known and which secured no countervailing benefit. The respondent needs to be compensated in respect of both items if, in the language of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at p 39, he is to be put "in the same position as he would have been if he had not sustained the wrong for which he is now getting compensation". In other words, in my judgment, the correct basis of the respondents' claim was the hybrid basis.

V. ORDERS SOUGHT

46. The Routhans accordingly and respectfully seek orders:

    a. dismissing the cross-appeal; and

    b. awarding them standard costs in this Court on the cross-appeal.

Dated 8 December 2023

D R Kalderimis / T Nelson / O T H Neas
Counsel for the Appellants

[138] At 201.
[139] At 202.

APPELLANTS' LIST OF AUTHORITIES FOR CROSS-APPEAL

Cases

1. *Benton v Miller & Poulgrain* [2005] 1 NZLR 66 (CA)
2. *BNZ v NZ Guardian Trust Co Ltd* [1999] 1 NZLR 664 (CA)
3. *Cemp Properties (UK) Ltd v Dentsply Research & Development Corp* [1991] 34 EG 62 (CA)
4. *Cox & Coxon Ltd v Leipst* [1999] 2 NZLR 15 (CA)
5. *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL)
6. *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20, [2022] AC 783
7. *Marlborough District Council v Altimarloch Joint Venture Ltd* [2012] NZSC 11, [2012] 2 NZLR 726
8. *Meadows v Khan* [2021] UKSC 21, [2022] AC 85
9. *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (Wagon Mound No. 1)* [1961] AC 388 (PC)
10. *Roberts v Jules Consultancy Ltd (in liq)* [2021] NZCA 303, (2021) 22 NZCPR 288
11. *Shabor Ltd v Graham* [2021] NZCA 448, (2021) 22 NZCPR 466
12. *South Australia Asset Management Corp v York Montague Ltd* [1997] AC 191 (HL)
13. *Stirling v Poulgrain* [1980] 2 NZLR 402 (CA)

Texts and commentary

14. A Burrows *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (4th ed, Oxford University Press, Oxford, 2019)
15. P Davies and J Pila (Eds) *The Jurisprudence of Lord Hoffmann: A Festschrift in Honour of Lord Leonard Hoffmann* (Bloomsbury, Oxford,2015) (chapters by T Honoré and A Burrows)
16. D McLauchlan "Assessment of Damages for Misrepresentations Inducing Contracts" (1987) 6(3) Otago Law Review 370